UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 06-550-JVS (ANx)	Date	March 10, 2008
Title	Newpath Networks LLC v. The City of Irvine, California, et al.		

Present: The Honorable	James V. Selna

Karla J. Tunis	Not Present
Deputy Clerk	Court Reporter

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: (In Chambers) Order Granting in Part and Denying in Part Plaintiff's Motion for Summary Judgment as to Counts I, II, VI, VII (fld 1-23-08)

Plaintiff Newpath Networks, LLC ("NewPath") filed this action on June 12, 2006, requesting declaratory and injunctive relief against Defendants City of Irvine, et al. (collectively "Irvine"). NewPath now moves this Court for an order granting summary judgment on the following issues: (1) whether Irvine's Wireless Communications Ordinance ("WCO") is preempted by 47 U.S.C. § 253(a); (2) whether the WCO is valid under the safe harbor provision of 47 U.S.C. § 253(c); whether the WCO is preempted by Cal. Pub. Util. Code §§ 7901 and 901.1; and (4) whether Irvine's actions violate the Fourteenth Amendment's Equal Protection Clause.

I. BACKGROUND

NewPath is a competitive local exchange carrier which provides service to wireless communications carriers, and has been attempting to construct a distributed antennae system ("DAS") in Irvine's Turtle Rock subdivision. On July 12, 2005, the Irvine City Council adopted Ordinance No. 05-13, (the "WCO"), "to establish citywide regulations for wireless communications facilities." (Newpath Request for Judicial Notice, Ex. 2 p. 4.) The ordinance revised Irvine's Zoning Ordinance to establish new regulations for wireless communications facilities citywide. (Id. p. 1; see, Irvine Zoning Ordinance ("IZO") §§ 2-9, 2-23, 2-37.5 and 3-8.)

After unsuccessful attempts to negotiate with the city, NewPath withdrew a

pending application for approval under the WCO, and filed the instant action requesting declaratory and injunctive relief. (See Mot. at 1-2, 5-10.)

II. LEGAL STANDARD

Summary judgment is appropriate only where the record, read in the light most favorable to the non-moving party, indicates that "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). Material facts are those necessary to the proof or defense of a claim, and are determined by reference to substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A fact issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." (Id. at 248.) In deciding a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." (Id. at 255.)

The burden initially is on the moving party to demonstrate an absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. If and only if the moving party meets its burden, then the non-moving party must produce enough evidence to rebut the moving party's claim and create a genuine issue of material fact. (See id. at 322-23.) If the non-moving party meets this burden, then the motion will be denied. Nissan Fire & Marine Ins. Co. v. Fritz Co., Inc., 210 F.3d 1099, 1103 (9th Cir. 2000).

III. DISCUSSION

A. Preemption Under the Federal Telecommunications Act

1. 47 U.S.C. § 253(a)

As the Ninth Circuit found in City of Auburn v. Qwest Corp., 260 F.3d 1160, 1175 (9th Cir. 2001), the Federal Telecommunications Act of 1996 (the "Telecom Act") expressly preempted state or local statutes and regulations regarding telecommunications services in stating that '[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a); Auburn, 260 F.3d at 1175.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 06-550-JVS (ANx) Date March 10, 2008

Title Newpath Networks LLC v. The City of Irvine, California, et al.

Accordingly, the Court must determine whether Irvine's regulations interfere with or are contrary to the Telecom Act, and are therefore preempted. See, Auburn, 260 F.2d at 1175. "Section 253(a) preempts regulations that not only prohibit outright the ability of any entity to provide telecommunications services, but also those that may have the effect of prohibiting the provisions of such services." Id. (internal quotations and citations omitted.)

NewPath argues that the WCO is so restrictive as to amount to effective prohibition and is therefore preempted on its face by § 253(a).[1] The relief NewPath requests pursuant to this claim is 1) a finding that the WCO, as codified in Irvine's Zoning Ordinance, is preempted by § 253(a) and therefore, invalid; and (2) a permanent injunction barring Irvine from enforcing the WCO. While the parties strongly disagree about the standard for mounting such a challenge,[2] the Court believes the authoritative

[1] NewPath is required to mount a facial challenge under § 253(a) because it withdrew its application before Irvine could issue a final approval or denial of the permit, which NewPath could have challenged as an individual decision prohibiting or having the effect of prohibiting the provision of wireless services under §232(c)(7). See, Sprint Telephony PCS v. County of San Diego, ("Sprint II") 490 F.3d 700, 707 (9th Cir. 2007).

[2] Irvine argues that a plaintiff mounting a facial challenge must show that "the applicable law can never be applied consistent with federal law"; or, in other words, "that no set of circumstances exists under which the Act would be valid." (Opp'n at 7.)

Irvine's citation to City of Chicago v. Morales, 527 U.S. 41, 55 & n.22 (1999), is patently misleading. The cited language in Morales is part of a footnote criticizing the dissent's application of the Salerno formulation and specifically noting that is most likely inappropriate for federal courts to apply this standard. Morales, 527 U.S. at 55, n. 22, citing United States v. Salerno, 481 U.S. 739, 745 (1987.) While the Court is aware that the Ninth Circuit also quoted the Salerno formulation in Sprint II, that

cases are consistent in their analysis of §253(a) preemption. See Sprint Telephony PCS v. County of San Diego, ("Sprint II") 490 F.3d 700, 715-716 (9th Cir. 2007); Auburn, 260 F.3d at 1175-76.

In order to mount a facial challenge, NewPath must demonstrate that the law on its face prohibits, or has the effect of prohibiting, the provision of wireless services and is therefore barred by §253(a). A list of possible factors for the Court's consideration in examining a facial challenge to an ordinance was approved by the Ninth Circuit in Sprint II. See Sprint II, 490 F.3d at 715-16. Though the court did not attempt to formulate an exhaustive list of applicable considerations, it did note that the following factors were of concern to its preemption analysis in both Sprint II and Auburn:

> (1) an onerous application process imposing burdensome requirements on telecommunications companies and giving significant discretion to local government officials to grant or deny permission to use the right-of-way;
> (2) a requirement to obtain a franchise;
> (3) the threat of criminal or civil penalties for failure to meet municipal requirements, or obtain municipal consent; and
> (4) a combination of these factors; for example, regulations coupled with a lengthy approval process.

See Sprint II, 490 F.3d at 716 (noting that the Ninth Circuit identified the relevant factors in Auburn and finding that its concerns in Sprint II were "almost identical"); Auburn, 260 F.3d at 1175-76 (summarizing the requirements other cases have looked to in evaluating § 253(a) preemption).

The WCO categorizes wireless communication facilities and their equipment into eleven separate classes of "antennas" based on "observed aesthetic impacts." (See, IZO §

---

quotation was dicta and, more importantly, is not the cite Irvine provided to support its use of the standard. See Sprint II, 490 F.3d at 711 (noting that there is a high burden for parties asserting facial challenges and quoting language from Salerno in a parenthetical citation).

1-2.) These distinctions are based on criteria such as how the antennae is mounted, how it is camouflaged, the size of the antennae, whether it is "co-located" with other antennas or on an approved wireless communications facility, and the extent to which the antennae is still visible after camouflage techniques. (IZO, § 1-2.) The WCO then links the various antenna classes to a matrix of possible locations, in order to assign each class of antenna in a location group to a specific kind of Conditional Use Permit ("CUP"). (IZO, § 2-37.5.2)

For example, a Class 2 Antenna in a non-residential district within 150 to 400 feet of a residential, open space district or public park only requires a Wireless Communication Facility Permit ("WCFP"), which can be awarded with staff-level review. (Id.) Some wireless communications facilities require Minor Conditional Use Permits ("ZA") and are reviewed by the Zoning Administrator, while the majority require Major Conditional Use Permits ("PC") and are reviewed by the Planning Commission. (Id.) Still other types of antennas are barred outright in particular location classes. (Id.)

When applying for a WCFP, an applicant must submit, among other things:

1. A deposit fee;
2. A letter of justification describing the proposed facility and explaining how it will satisfy Section 2-37.5-5 (which requires, among other things, findings on the facility's visual compatibility with surroundings);
3. Notice materials for public meetings and hearings;
4. Proof that the carrier has not entered into any agreement prohibiting co-location at the proposed site;
5. A map indicating the proposed side and detailing existing facilities owned and operated by the applicant, as well as a disclosure of all facility locations planned for the next 12 months;
6. Technical information that justifies the proposed height of the antenna mount;
7. Alternative site analysis that assesses the feasibility of alternative sites, as deemed necessary by the city, which should include an explanation of why other sites were not selected;
8. Alternative configuration analysis, assessing the feasibility of alternative antenna construction configurations, at the proposed site and in the surrounding vicinity, as deemed necessary by the city;
9. A projection of the carrier's anticipated future site needs within the city;

10. Other information as may be required by the Director of Community Development.[3]

(See IZO, § 2-37.5-4.)

Before a permit application can be approved by the appropriate body, either the Zoning Administer or the Planning Commission must make a series of findings, in addition to the findings required for other ZAs and PCs. (IZO, § 2-37.5-5.) These findings must include the following:

1. The proposed Wireless Communication Facility is visually compatible with the surrounding neighborhoods.
2. The proposed Wireless Communication Facility is not detrimental to the public health, safety, or general welfare.
3. The proposed Wireless Communication Facility is proposed to function in compliance with all applicable regulations of the Federal Communications Commission.
4. The proposed Wireless Communication Facility complies with the provisions of Chapter 3-8, Wireless Communications Facilities, Satellite Dish and Antenna Standards, as modified by this Ordinance.
5. An alternative site(s) located further from a Residential District or Public Park cannot feasibly fulfill the coverage needs fulfilled by the installation at the proposed site.
6. An alternative antenna construction plan that would result in a lower "Antenna Class" category for the proposed facility is not reasonably feasible and desirable under the circumstances.

(Id.) No guidelines are given as to how the appropriate entity should arrive at these findings, and the subjective nature of the approval criteria is further reflected in the

[3] The fact that the Court has underlined certain language in the summary does not necessarily indicate that such language represents the only offending portions of the ordinance.

ordinance's "Intent" section. (Id., §3-8-1.)[4]

While the WCO has additional provisions, the above summary is sufficient for the Court to find that the "these requirements, particularly when considered together, are patently onerous and have the effect of prohibiting . . . telecommunications companies from providing telecommunications services." See Quest Communications v. City of Berkeley, 433 F.3d 1253, 1258 (9th Cir. 2006); Auburn, 260 F.3d at 1176. Moreover, Irvine has the power to build into any approval an undefined requirement for subsequent reconsideration, rendering such "approvals" uncertain. (IZO, § 2-37.5-9.)

The requirements for filing an application are lengthy, time consuming and certainly expensive. Successful applicants must submit information regarding alternative sites and configurations, must agree not to prohibit co-habitation at the proposed site, and describe all anticipated future locations for use within the next year, as well as any "[o]ther information as may be required." (IZO, § 2-3-75.4). This last requirement is particularly onerous as it does not appear to place any limitation on the what the Director of Community Development may require, or when he may require it.

Moreover, before a permit can be approved, the proper entity must make a series of patently discretionary findings regarding the facilities visual compatibility with surrounding areas and the feasibility of alternate cites or constructions. (IZO, § 2-37.5-5.) At any point, and with no limitation, the Director of Community Development may forward the permit to the Zoning Administrator for review, at which point a public hearing may also be required. (IZO, § 2-37.5-7.)

The Court finds that these regulations are burdensome and prohibitive and, in combination, have the effect of prohibiting the provision of telecommunications services, and "create a substantial and unlawful barrier to entry into participation" in Irvine's telecommunications market. See Auburn, 260, F.3d at 1176. While the Court is sympathetic to Irvine's argument that judicial decisions in this area have not been particularly instructive in telling municipalities how they may regulate in accordance with

[4] For example, the ordinance expresses concern about a "viewer's perception of the community," "visual eyesores," and "unpleasant impressions." (IZO, § 3-8-1.)

the Telecom Act, it is not for the Court to craft Irvine's zoning code. Accordingly, the Court finds that the WCO is preempted by § 253(a).

2. "Safe Harbor" Provision of 47 U.S.C. § 253(c)

Irvine argues that any provisions of the WCO not in compliance with § 253(a) may be saved by the "safe harbor" provision of § 253(c). Section 253(c) states that "[n]othing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclose by such government."

Beyond the statement that it may "prevail by demonstrating that the regulation falls within the right-of-way management safe harbor" provision, however, Irvine fails to make a single argument concerning how the WCO qualifies for protection under this provision. (Opp'n. at 8.)

As the Ninth Circuit has noted, "[t]he Telecom Act does not define management of the public rights-of-way." Auburn, 260 F.3d at 1177. Accordingly, the court in Auburn relied on a rulings by the Federal Communications Commission and the Telecom Act's legislative history for guidance when if found that "right-of-way management means control over the right-of-way itself, not control over companies with facilities in the right-of-way." Id. According to the FCC,

> the types of activities that fall within the sphere of appropriate rights-of-way management . . . include coordination of construction schedules, determination of insurance bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them.

Id.

Thus, Auburn held that regulations requiring a company to submit proof of its financial, technical and legal qualifications for providing telecommunications services

were not aimed at regulating the public rights-of-way. Id. Further, the court noted that regulations requiring a company to submit descriptions of the services to be provided did not "directly relate to management of the rights-of-way" because a city "does not have the authority to request information regarding systems, plans, or purposes of the telecommunications facilities." Id.

Here, the Court finds that many of the WCO requirements cannot be described as directly related to management of the public rights-of-way. For example, many of the permit classifications are determined by the cosmetic properties of the structure and the structure's proximity to residential or public spaces. (IZO, §1-2, 2-37.5-3.) The WCO also requires a letter of "justification describing the proposed wireless communication facility," a description of the "communication services, equipment, or facilities that the applicant will offer or make available to the City or other public, educational and government institutions," and a finding that the facility is "visually compatible with the surrounding neighborhood." (Id. at §2-37.5-4, 2-37.5-6.)

As is apparent, these provisions have more to do with regulating the appearance of the telecommunications facilities than regulating the public rights-of-way. Accordingly, the Court finds that the WCO is not saved by the safe harbor provision of § 253(c).

3. Severability

"To determine whether invalid portions of the ordinances are severable, we look to state law." Auburn, 260 F.2d at 1180. In California,

> the presence of a severability clause coupled with the ability functionally, mechanically, and grammatically to sever the invalid portion from the valid portions of an enactment ordinarily will allow severance but only if the remainder of the enactment is complete in itself and would have been adopted without the invalid portion.

Qwest Communications v. City of Berkeley, 433 F.3d 1253, 1259 (9th Cir. 2006).

Given the number and variety of provisions of the WCO that are preempted by the Telecom Act, the Court finds that "attempting to sever the invalid from the valid provisions would not be appropriate. See Auburn, 260 F.3d at 1180 (applying

Washington law). As in Auburn, the Court "cannot say that the objectionable portions of the present ordinance may be excised without rendering the end product a Swiss cheese regulation that would not be capable of accomplishing the ordinances legislative purposes." Id. at 1180-81 (applying Washington law). Moreover, Irvine failed to request that the Court sever any invalid potions of the WCO, and failed to make any argument regarding severability, in its opposition to this motion.[5]

Accordingly, the Court finds that the WCO is preempted by §253(a) in its entirety and is therefore invalid. However, the Court declines to issue an order requiring Irvine to issue all necessary permits for the construction of NewPath's DAS. As Irvine argued at the hearing on this motion, NewPath chose to raise a facial challenge to the WCO, rather than wait for a final determination of its permit application. For that reason, the relief available under § 332(7) is not available here.

B. Preemption by Cal. Pub. Util. Code §§ 7901 and 7091.1

NewPath also requests that this Court find the WCO preempted by Cal. Pub. Util. Code §§ 7901 and 7091.1.

The Court notes that the Ninth Circuit has twice requested that the Supreme Court of California decide the question of whether "§§ 7901 and 7901.1 permit public entities to regulate the placement of telephone equipment in public rights of way on esthetic grounds." See Sprint PCS Assets v. City of Palos Verdes Estates, 508 F.3d 897, 897 (9th Cir. 2007); Sprint PCS Assets v. City of Palos Verdes Estates, 487 F.3d 694, 695 (9th Cir. 2007). In light of the Ninth Circuit's statement that "[t]he decisions of the Supreme Court of California and the California Courts of Appeal provide no answer," the Court declines to exercise supplemental jurisdiction over NewPath's state law claims. 28 U.S.C. §1367(c)(1).[6]

---

[5] Only the opposition brief filed on February 25, 2008 by Amicus discusses severability. (See Docket No. 98, p. 8.)

[6] The Court recognizes the Ninth Circuit's finding in Sprint PCS v. City of La Cañada Flintridge, 250 Fed. App. 688, 691 (9th Cir. 2006), that a city's regulatory power "is functional, and does not extend to

C. Equal Protection Claim

The parties appear to agree that NewPath is not a member of a suspect class, and that Irvine's actions have not infringed on any fundamental rights. (See Mot. at 23; Opp'n at 16; NewPath's Reply at 10.) Accordingly, NewPath argues only that Irvine's conduct cannot meet the requirements of the rational basis test, because there is no legitimate government interest requiring NewPath to submit to the WCO's provisions.

Because rational basis review applies, the Court presumes that the WCO's requirements are valid and sustains their application if the WCO "is rationally related to a legitimate state interest." Berger v. City of Seattle, 512 F.3d 582, 606-07 (9th Cir. 2008). During oral argument, NewPath argued that it should not be subject to the provisions of the WCO because it is a competitive local exchange carriers that utilize antennas, and not a wireless communications provider. Accordingly, NewPath argues that treating exchange carriers that utilize antennas differently than traditional exchange carriers that do not, is irrational and amounts to an equal protection violation.[7] The first argument is irrelevant, as the question here is not whether the WCO is preempted, but whether it is rationally related to a legitimate state interest. The second argument also is unavailing.

The WCO explicitly states that it is designed to "ensure all Wireless Communication Facilities are appropriately located, designed and maintained to protect the public health, safety, and welfare, while minimizing their adverse visual and environmental effects." (IZO § 2-37.5.1.) The Ninth Circuit has specifically held that

---

aesthetics" under Cal. Util. Code. §§ 7901 and 7091.1. However, the La Cañada Flintridge opinion is unpublished, and therefore provides no guidance for this Court. See id. at 689.

[7] During oral argument, NewPath correctly pointed out that the Court mis-characterized Newpath as a "wireless carrier" in its tentative opinion, and further, mis-characterized the basis of its equal protection claim. The Court has corrected this error; however, reclassifying NewPath as an "exchange carrier" does not make the argument meritorious.

"improving safety and aesthetics are substantial government interests." Honolulu Weekly, Inc. v. Harris, 298 F.3d 1037, 1048 (9th Cir. 2002).

Thus, the Court finds that NewPath has failed to demonstrate that Irvine's treatment of exchange carriers that utilize antennas amounts to a violation of NewPath's civil rights. NewPath's motion for summary judgment on its equal protection claim is accordingly denied.[8]

Although the instant motion was filed by NewPath, the Court finds that the issue has been fully ventilated, and awards summary judgment in favor of Irvine on NewPath's equal protection claim. See Cool Fuel, Inc. v. Connett, 685 F.2d 309, 311-12 (9th Cir. 1982).

IV. CONCLUSION

For the foregoing reasons, the Court:

1. Grants NewPath's motion for summary judgment on the federal preemption claim, and finds that the WCO is preempted by § 353(a);

2. Declines to exercise supplemental jurisdiction over NewPath's state law claims;

3. Denies Newpath's motion for summary judgment and awards summary judgment in favor of Irvine on NewPath's equal protection claim; and

4. Orders NewPath to submit a proposed order detailing the requested permanent injunction, in accordance with the above holding, within 10 days.

---

[8] To the extent Newpath's 42 U.S.C. §§ 1983 and 1988 claims are premised on violations of the Telecom Act, the law is clear that § 253(a) does not create a private right of action enforceable through §1983. See Sprint II, 700 F.3d at 717. To the extent they are based on equal protection violations, the Court rules against NewPath for the reasons stated above.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 06-550-JVS (ANx) Date March 10, 2008

Title Newpath Networks LLC v. The City of Irvine, California, et al.

: 00

Initials of Preparer kjt